No. 21047

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES W. CORRINGTON,

Appellant,

vs.

JAMES E. WEBB, etc., *et al.,*

Appellees.

Appeal From Judgment of Dismissal After Order Granting Motion for Summary Judgment.

BRIEF OF APPELLANT, JAMES W. CORRINGTON.

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TOPICAL INDEX

TABLE OF AUTHORITES CITED

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BRIEF OF APPELLANT, JAMES W. CORRINGTON.

JURISDICTION.

This case is before the Court upon an appeal from a judgment of the United States District Court, Southern District of California, Central Division, following the granting of a motion for summary judgment in favor of the Appellee.

The action in the Court below was brought by Appellant for a declaratory judgment and other equitable relief to restore him to employment with the National Aeronautics and Space Administration of the United States, and jurisdiction in the Court below was invoked pursuant to Sections 1331, 1332, 2201, and 2202, of Title 28, United States Code; Section 1009 of Title 5 of the United States Code, and upon the Fifth and Sixth Amendments to the Constitution of the United States. Appellant further invoked the Veterans Preference Act of 1944, as amended, Section 863 of Title 5 of the United States Code.

STATEMENT OF THE CASE.

I.

The Court's Findings of Fact.

The Court found, in substance, that Appellant had been engaged as an experimental jet aircraft mechanic by the National Aeronatutics and Space Administration of the United States. On March 12, 1962, he was removed from this position by direction of the personnel officer, National Aeronautics and Space Administration, Edwards Air Force Base, California. He was notified by letter dated October 1, 1962, from the Board of Appeals and Review of the Civil Service Commission that his removal from his employment had been upheld. Following this letter, no further administrative remedies were available to the Appellant. After his removal became final, Appellant sought the advice of an attorney. His action in the Court below was not filed until August 13, 1965, more than 34 months after the plaintiff's removal became final.*

The Court drew as its Conclusion of Law that it had jurisdiction to review the administrative proceedings pursuant to 28 U.S.C. Section 1361 and that by not filing his complaint for review of the administrative proceeding for a period of 34 months after notification of the final decision of the Board of Appeals and Review, Appellant was estopped as a matter of law by his laches from claiming the relief sought.

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*The Findings of Fact and Conclusions of Law [Tr. p. 186] indicate in Finding No. III that the letter of notification dated October 1, 1962, represented the end of the administrative process. Finding No. IV states that after his removal became final on October 1, 1963, the plaintiff sought the advice of an attorney. The use of date "1963" rather than "1962" is stenographic error and conceded by Appellant.

II.

Statement of the Evidence.

Plaintiff, a veteran of World War I, was employed by the Naitonal Aeronautics and Space Administration as a Jet Aircraft Mechanic, WB 10, at Edwards Airforce Base in California, until his removal on March 12, 1962 [Tr. p. 3].

On February 8, 1962, N.A.S.A. instituted removal proceedings against Appellant, charging him with deficiency in performance of duties, actions causing or tending to cause damage to federal property, actions endangering the safety of others and negligence [Tr. pp. 10-12].

Appellant duly denied the charges in some detail [Tr pp. 13-17]. However, he was advised on March 5, 1962, that a final decision had been made to remove him [Tr. pp. 18-19].

This determination was promptly appealed to the Director, Twelfth U.S. Civil Service Region, San Francisco, on March 17, 1962, and a hearing requested [Tr. p. 20].

Upon receiving notice of hearing, appellant designated a fellow employee as his hearing representative. He also furnished respondent with a list of his proposed witnesses. However, on April 20, 1962, respondent advised appellant that he would be limited to five witnesses only [Tr. p. 22].

On April 22, 1962, appellant designated 5 witnesses whom he desired. However, feeling that these witnesses did not sufficiently rebut all of the named charges against him, on May 1, 1962, he submitted an additional designation of witnesses [Tr. pp. 23-24].

STATEMENT OF QUESTION TO BE REVIEWED.

Did the trial court err in holding that Appellant was guilty of laches as a matter of law in delaying the filing of his action to review the administrative finding?

ARGUMENT.

The Finding That Appellant Was Guilty of Laches Is Contrary to Both the Evidence and the Law.

Appellant's affidavit filed in opposition to the motion for summary judgment appears at pages 180 and 181 of the Transcript of Record. This affidavit was uncontradicted.

The affidavit indicates that Appellant did all of those things which a reasonable and prudent layman would do to protect his rights under law. He proceeded as diligently as a layman could be expected to proceed.

In his proceedings before the Civil Service Commission he was represented by a fellow employee, one whom, we may assume, was unaware of the necessary legal action to be taken to review a decision of the Civil Service Commission.

Immediately upon receiving the decision of the Commission, he consulted an attorney in Lancaster, California. That Attorney agreed to represent appellant in obtaining a vindication of his rights. It is true, and the affidavit has been scrupulous in setting forth the conversation which the appellant had with the attorney, that what the attorney said was that he would

"look into the matter to determine what my legal rights were insofar as appealing the decision of the Civil Service Commission." That attorney had never had a similar type of problem in the past.

The local attorney, behaving as a reasonable and prudent general practitioner would be expected to behave, decided to obtain the services of a specialist in the field. He sought assistance in locating a law firm in the District of Columbia specializing in actions of this type.

He was furnished the name of such a law firm and transmitted the file to them. Then, the local practitioner became a Judge in the Municipal Court, and the problem of communication from Appellant to his local attorney to his Washington, D.C. attorney became compounded. It was not until June of 1965 that he first discovered that no action had been filed and immediately upon receiving that advice, he consulted other counsel who filed the instant act on one month later.

In selecting the United States District Court as his forum, rather than the Court of Claims, appellant consciously waived any claim to back wages in excess of the jurisdiction of the United States District Court, since he recognized the extent of the delay which had occurred and desired to do equity, as he sought equity.

In considering the equities here presented, the language of the United States Court of Appeals, reversing a judgment of the trial court barring relief on the ground of laches, is peculiarly appropriate. An action had been brought by a postal employee 32 months after

his discharge had become final. The trial court, applying a *per se* standard, held the action barred by the doctrine of laches. The Court of appeals reversed saying:

> "In suit for reinstatement in government employment, as in equitable actions generally, laches has two elements, (1) unreasonable delay in prosecuting a claim and (2) resulting prejudice. *Gurley v. Wilson,* 99 U.S.A.P.P.D.C. 336, 239 F 2d 975. In the present case the second element is not clearly present, and the first element is absent."
>
> *Duncan v. Summerfield,* 251 F. 2d 896, 897.

There is no showing of prejudice in the record and certainly the evidence would negative "unreasonable" delay in prosecuting the claim.

The cases which were cited by the appellee in the Court below all have within them these two elements.

Nicholas v. United States, 257 U.S. 7 involved an action brought three years after removal from office, but with no objection to the removal having been made prior to suit.

Norris v. United States, 257 U.S. 77 involved an action brought eleven months after removal from office, the Court stating ". . . but no fact is found explaining his failure to assert his right to the office, or its emoluments, for the period of eleven months and a little over." (page 80). In addition, the Court noted that the office had been abolished in the interim.

Arant v. Lane, 249 U.S. 367, 371-372 involved a discharge without the bringing of formal charges and a delay of twenty months prior to the filing of the action. The Court stated that the delay, when *unexplained,* results in application of the doctrine of laches.

United States v. Wickersham, 201 U.S. 390 also involved a wrongful discharge without the bringing of charges. Two months later the employee demanded his salary but did not bring suit for four and a half years without explaining his delay.

Chappelle v. Sharpe, 301 F. 2d 506, 507 involved a delay of 34½ months before the bringing of the action. The Court noted, "the defendant officials moved to dismiss, filing in support an affidavit reciting facts which upon their face, pose the problem of laches." In this case, no problem of laches has been posed by the record.

Morse v. United States, 59 Ct. Cl. 139, involved the delay of over thirteen months before the filing of a petition with the only reason for the delay being that Appellant had "experienced much uneasiness over the possibility of his reinstatement in the service and his immediate removal therefrom in accordance with the Civil Service law." In the absence of any explanation of the delay, the petition was dismissed.

Conclusion.

Considering the work classification of appellant, it is obvious that there could be no showing of prejudice to appellee except insofar as the question of back pay is concerned. Appellant has from the outset stipulated to an equitable remittitur of any portion of the back wages found to be attributable to delay. Appellant's delay is not only not unreasonable but represented the best efforts by a layman to seek relief as expeditiously as a layman can obtain it. For the reasons stated, it is respectfully submitted that the judgment of the trial court should be reversed.

Respectfully submitted,

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Attorneys for Appellant.

Dated: December 2, 1966.

Certificate.

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the instant brief conforms to all requirements therein set forth.

LIONEL RICHMAN